IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**No. 02-20300 MaV**
	)	
BRIAN LEWIS,	)	
	)	
Defendant.	)	

REPORT AND RECOMMENDATION
ON DEFENDANT'S MOTION TO SUPPRESS

The defendant in this case, Brian T. Lewis, has been indicted on one count of possessing a firearm as a convicted felon in violation of 18 U.S.C. § 922(g). This charge arises out of a stop by police officers of a vehicle Lewis was driving, the search of that vehicle, the subsequent search of a hotel room, and the seizure by police officers of a .38 caliber Ruger from the nightstand in that hotel room. Lewis moved to suppress all evidence seized and statements made as a result of the vehicle and hotel room searches, alleging that the evidence was obtained in violation of his Fourth and Fifth Amendment rights and therefore is the fruit of a poisonous tree. His motion was referred to the United States Magistrate Judge for a report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B) and (C).

Pursuant to the reference order, an evidentiary hearing was held on December 3, 2002. At the hearing, the government presented two witnesses, Officers Ronnie Elrod and Michael McCord of the Memphis Police Department. The government also introduced, as an exhibit, a consent to search form signed by Brian Lewis.

After careful consideration of the statements of counsel, the testimony of the two witnesses, the exhibit, and the entire record in this cause, the court submits the following findings of facts and conclusions of law and recommends that the motion to suppress be granted in part and denied in part.

PROPOSED FINDINGS OF FACT

Because the government presented only two witnesses, both police officers whose stories largely corroborate each other's, and the defense presented no witnesses, the officers' testimony is uncontradicted. The court finds the officers' testimony to be credible and accepts as fact their version of the events.

On the morning of August 18, 2002, Officer Ronnie Elrod of the Memphis Police Department was patrolling the North Precinct, Memphis, Tennessee. He was in uniform, in a marked police vehicle, and accompanied by Officer Thomas, his partner. At about 9:30 or 10:00 a.m., the officers saw a blue Ford Explorer weaving through traffic at a high rate of speed. The officers "paced" the Explorer, determined that it was traveling about eighty miles per

hour in a forty-five mile per hour zone, and pulled over the Explorer at the corner of Austin Peay and Coleman by flashing their blue police vehicle lights.

After the vehicles came to a stop, Officer Elrod approached the driver's side of the Explorer. Officer Thomas approached the passenger side. The driver, Brian Lewis, rolled down his window. Officer Elrod, standing inches away from the window, immediately smelled an odor that he identified as fresh marijuana: a pungent smell reminiscent of fresh-cut wet grass.

Officer Elrod asked Lewis for identification. Lewis produced a valid driver's license with a local address. Officer Elrod then asked Lewis if Lewis had anything illegal in the car. Lewis said no. Officer Elrod then asked, "Mind if I look?" Lewis again said no. Officer Elrod asked a couple additional questions, including "Where are you going in such a hurry?", to which Lewis responded, "To my hotel", and "Whose car is this?" (The testimony regarding Lewis's response is not clear, but it seems the Explorer was a rental belonging to someone other than Lewis). Officer Elrod testified that, at this time, he intended to investigate the source of the marijuana odor.

Officers Elrod and Thomas removed from the Explorer both Lewis and his passenger, Brandon Matthews. The officers secured the two in the back of the police vehicle but did not handcuff them.

Officer Elrod then searched the Explorer. His search revealed a set of postal scales and a duffelbag which contained a hotel key, a notepad from the Fairfield Inn in Memphis, open sandwich bags, and leaves and seeds that Officer Elrod identified as marijuana residue.

Officer Elrod returned to the police vehicle and asked Lewis several more questions, including, "Is this your duffel?", to which Lewis answered yes, and "Is there anything in your hotel room?", to which Lewis answered no. Officer Elrod also asked Lewis the location of the hotel. Lewis responded that it was off American Way in Memphis. Officer Elrod testified that he wanted to search the hotel room because, in his experience, people often dealt drugs from hotels. He found it suspicious that Lewis would stay at a local hotel when Lewis's license showed a local address. Officer Elrod called the Fairfield Inn, which confirmed that Brian Lewis was a registered guest. He also called Officer McCord, who was on patrol in the North Precinct. He asked Officer McCord to bring him a consent to search form because neither he nor Officer Thomas had one in their police vehicle.

Officer McCord arrived a few minutes later with the consent form. Officer Elrod completed and signed a portion of the form. He then opened the rear door of the police vehicle and handed the form to Lewis, who was still seated in the back of the police

vehicle. Lewis took a few moments--something between one and five minutes, according to testimony--to read the consent form. The form advised Lewis of his right to refuse a search. The officers asked Lewis if he understood the form. They testified that Lewis appeared to understand the form. Lewis then signed the form. At this point, the traffic stop had lasted about thirty minutes. No threats or promises were made to Lewis. At no time did anyone advise Lewis of his *Miranda* rights.

After obtaining Lewis's signature on the consent form, the officers traveled, with Lewis and Matthews still in their custody, to the Fairfield Inn on American Way in Memphis. Officers Elrod, Dody, and McCord, along with the defendant Lewis, proceeded to Lewis's hotel room. The officers knocked and announced their identity, then entered the room. Lewis did not protest. Shortly after their entry, a man came out of the room's bathroom. The officers seated the man and asked him to open the drawer of a hotel nightstand behind him. He did so, revealing the .38 caliber Ruger that was seized as evidence. The search of the room also revealed about $2,000 in cash in the pocket of pants that were on the floor. Later, at the Memphis Police Station at 201 Poplar Avenue, Lewis was advised of his *Miranda* rights and executed an inculpatory written statement.

PROPOSED CONCLUSIONS OF LAW

Because the initial stop, the search of Lewis's vehicle, the search of Lewis's hotel room, and the seizure of evidence were all performed without a warrant, the government bears the burden of proving that they were lawful under the Fourth Amendment. 5 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 11.2(b) (3d ed. 1996). Each of the government's acts must be considered separately. *United States v. Bentley*, 29 F.3d 1073, 1075 (6th Cir. 1994). Lewis, in his motion and through argument, raises the following issues: (1) whether the vehicle search was constitutionally justified, either by the lawful scope of a traffic stop or as a search conducted pursuant to consent; (2) if justified by consent, whether the vehicle search is invalid because such consent was involuntary, unknowing, or the result of unlawful detention; (3) whether Lewis's consent to the hotel room search is invalid for the same reasons; and (4) whether the evidence seized from the hotel room should be suppressed as the fruits of an unlawful custodial interrogation.[1]

The parties do not seriously dispute whether the initial stop was justified. A traffic stop and the attendant detention of a driver or passenger is reasonable under the Fourth Amendment if law

---

[1] **Lewis orally raised the *Miranda* issue at the evidentiary hearing. This court requested, and counsel have submitted, supplemental briefs on the issue.**

enforcement officers have probable cause to believe a traffic violation occurred, "and it is irrelevant what else the officer knew or suspected about the traffic violator at the time of the stop." *United States v. Ferguson*, 8 F.3d 385, 391 (6th Cir. 1993). *See also United States v. Heath*, 259 F.3d 522, 528 (6th Cir. 2001) (discussing the *Terry* stop as an exception to the probable cause requirement). The officers clearly were justified in stopping Lewis, because they observed Lewis exceeding the speed limit in violation of the Memphis Municipal Code. *See* MEMPHIS, TENN., MUNI. CODE § 21-106 (obligating drivers to obey posted speed limits).

1. <u>Lawfulness of Initial Detention</u>

Officer Elrod's detention of Lewis, for the purpose of requesting his driver's license and briefly questioning him about his destination and the ownership of the vehicle, fell within the scope of the initial traffic stop. *See United States v. Shabazz*, 993 F.2d 431, 437 (5th Cir. 1993). In addition, an officer during a traffic stop is entitled to ask the driver as well as any passengers to exit the vehicle, *see Maryland v. Wilson*, 519 U.S. 408, 414 (1997)(passenger); *Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977)(driver), and it was well within Officer Elrod's discretion to require the driver to enter his police car, *see United States v. Bradshaw*, 102 F.3d 204, 211 (6th Cir. 1996)(holding that detention in a police vehicle while verifying

identity during traffic stop does not automatically constitute arrest); *United States v. Mesa*, 62 F.3d 159, 162 (6th Cir. 1995)(implying the driver lawfully can be detained inside the officer's car until the purpose of the initial stop is complete).

Once a traffic stop is completed, an officer must allow the driver and occupants of a vehicle to leave unless "something that occurred during the traffic stop generated the necessary reasonable suspicion to justify a further detention." *Mesa*, 62 F.3d at 162. However, law enforcement officers who have a reasonable and articulable suspicion that criminal activity is afoot may detain a person long enough to confirm or dispel that suspicion. *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968). The inquiry is whether the officers' actions after the stop were reasonably related in scope to the traffic stop, or otherwise justified by something occurring after the stop.

In this case, Officer Elrod smelled a marijuana odor emanating from Lewis's vehicle as soon as he began speaking to Lewis. The smelling of marijuana constituted probable cause to believe that marijuana was in the vehicle, *United States v. Garza*, 10 F.3d 1241, 1246 (6th Cir. 1993), and therefore gave Officer Elrod a reasonable articulable suspicion of criminal activity beyond the speeding violation. This suspicion justified further detention of Lewis to confirm or dispel the suspicion of illegal drug activity.

There is no bright-line rule for the proper duration of an investigatory stop, *see United States v. Sharpe*, 470 U.S. 675, 685-686, and the duration of the stop in question was reasonable under the circumstances. The entire stop lasted less than thirty minutes, including the time spent waiting for Officer McCord to arrive with a consent form for the search of the hotel room. Officer Elrod conducted this investigation with adequate diligence under the circumstances, and the duration of the investigation was reasonable.

In summary, the initial detention was reasonably related to the traffic stop, and the continued detention was reasonable to confirm or dispel the officers' suspicion that Lewis's vehicle was transporting contraband. For these reasons, it is submitted that the detention of Lewis was reasonable under the Fourth Amendment.

2. <u>Warrantless Vehicle Search and Consent to Vehicle Search</u>

An officer has probable cause to search the vehicle without a warrant when he smells the odor of marijuana inside a vehicle. *Garza*, 10 F.3d at 1246. In this case, Officer Elrod smelled a strong odor of marijuana as soon as Lewis rolled down the Explorer's window. Plus, during the initial stages of the stop, Lewis indicated he was going to a hotel, while his driver's license gave a local address. Officer Elrod knew from experience that hotel rooms were often the sites of drug deals. Under these facts,

it is submitted that the officers had probable cause to believe illegal drugs were in the Explorer and, accordingly, probable cause to conduct a warrantless search of the Explorer.

Even without probable cause, officers may make a warrantless search based upon the consent of an individual. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973); *United States v. Jenkins*, 92 F.3d 430, 436 (6th Cir. 1996). If the validity of a search rests on consent, the government has the "burden of proving that the necessary consent . . . was freely and voluntarily given." *Florida v. Royer*, 460 U.S. 491, 497 (1983).

The Sixth Circuit described its test for determining the validity of a consent to search in *United States v. Riascos-Suarez*, 73 F.3d 616 (6th Cir. 1996):

> **A court will determine whether consent is free and voluntary by examining the totality of the circumstances. It is the Government's burden, by a preponderance of the evidence to show through "clear and positive" testimony that valid consent was obtained. Several factors should be examined to determine whether consent is valid, including the age, intelligence, and education of the individual; whether the individual understands the right to refuse to consent; whether the individual understands his or her constitutional rights; the length and nature of detention; and the use of coercive or punishing conduct by the police.**

***Riascos-Suarez*, 73 F.3d at 625 (citations omitted).**

In this case, Officer Elrod asked, "Mind if I look [in the car]?" and Lewis answered, "No." Under the totality of the

circumstances, it appears that Lewis's consent was freely and voluntarily given. Lewis's age and intelligence indicated the ability to freely consent. The detention had been brief at this point. Lewis was still seated in his own vehicle. He was not alone but in the company of his passenger when he consented to the vehicle search. Lewis's prior encounters with the criminal justice system suggest a familiarity with his constitutional rights. There is no evidence of coercion or intimidation by the officers.

Accordingly, it is submitted that the vehicle search was valid and that evidence seized from the Explorer should be admitted. As discussed above, this consent was not abnegated by any unlawful detention.

3. Consent to Hotel Room Search

Lewis's consent to search the hotel room is valid for the same reasons that Lewis's consent to search the automobile was valid. The only differences between Lewis's verbal consent to the search of the vehicle and his written consent to the search of the hotel room were 1) that he was seated in the back of the police vehicle when he signed the consent form; and 2) that he had been detained there for fifteen to twenty minutes when he signed the consent form. These changes, however, do not affect the validity of Lewis's consent. Lewis was not handcuffed; he was still in his passenger's company; he had not been detained for more than thirty

minutes overall; and he was being held pursuant to a valid investigatory detention. *See United States v. Guimond*, 116 F.3d 166, 171 (6th Cir. 1997) (holding that detention in the police vehicle for a brief time, even after the traffic stop itself has ended, is legal and does not nullify a consent that is otherwise voluntary). In addition, Lewis held and read the consent form. The form includes a statement of the right to refuse a search. He was asked if he understood the consent form. Lewis indicated that he understood the form. He signed the form, without any threats, promises, or coercive behavior by officers.

4. Statements Made to Law Enforcement Officers

Lewis seeks to suppress statements made to law enforcement officers, particularly his affirmative response to Officer Elrod's question, "Is this your duffel?" Officer Elrod posed the question after searching the Explorer, discovering the duffelbag inside, and opening the duffelbag. Lewis answered while seated in the back of the police vehicle. The government admits that Lewis received no *Miranda* warnings before he was asked the question, nor at any time during the stop.

a. Custodial Interrogation and Miranda Warnings

The Constitution's Fifth Amendment privilege against self-incrimination prohibits the introduction of statements made during custodial interrogations unless the defendant was advised of his

constitutional rights and subsequently waived them. *Miranda v. Arizona,* 384 U.S. 436 (1966). Because *Miranda* applies only to custodial interrogations, the statement Lewis seeks to suppress must be analyzed to determine a) whether Lewis was in custody when the statement was made and b) whether the statement was the result of interrogation. *See Miranda,* 384 U.S. 436 (1966).

Regarding custody, "'[t]he ultimate inquiry is simply whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.'" *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (quoting *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977)). Because Officer Elrod himself testified that Lewis was not free to go after being placed in the back of the police vehicle, it is submitted that Lewis was in custody while making the statements he now seeks to suppress.

Regarding interrogation, "'[t]he term interrogation under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the subject.'" *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980). In this case, Lewis's claim of ownership was made in response to an officer's direct question: "Is this your duffel?" The parties do not dispute that it was an express question; the issue is whether

it was designed to elicit an incriminating response.

The Sixth Circuit considered this question in *United States v. Soto,* 953 F.2d 263 (6th Cir. 1992). In *Soto*, a law enforcement officer was looking at a family photograph provided by a detainee and asked, "What are you doing with crap like that [cocaine] when you have these two [a wife and daughter] waiting for you at home?" The court held that the question was interrogative because "in substance it was a direct inquiry into Soto's reasons for committing the offense he appeared to have committed." *Soto,* 953 F.2d at 264-65.

The Sixth Circuit also found interrogation, under more analogous facts, in *United States v. Thompson*, 1996 U.S. App. LEXIS 22287 (6th Cir. 1996). In *Thompson*, law enforcement officers had executed, pursuant to warrant, a search of a residence. They then desired to search a vehicle in the yard. A drug dog alerted on the vehicle. The officers removed an inside door panel and found a clear plastic bag. "Before the drugs were removed [from the car], the officers asked who owned the car." *Thompson*, 1996 U.S. App. LEXIS 22287 at *3-4. Thompson, who was cuffed and lying on the ground nearby, admitted that it was his. "The bag was removed and found to contain 33 grams of cocaine base," which was admitted into evidence against Thompson. *Id.* at *4-5. The court found that the officers "undoubtedly were almost 100% certain . . . that they had

found drugs" in the car before they questioned Thompson, and that it was unclear whether Thompson knew this when he answered the question. *Id.* at *12-13. "Under the circumstances," the court held, "the Defendant should have been read his Miranda rights before being questioned about the car." *Id.* at *11.

Lewis's case is analogous to Thompson's. Lewis was in the officers' custody, and the officers already had found marijuana residue in the duffelbag when they asked Lewis whether he owned the duffelbag. It is not clear that Lewis knew this. Accordingly, this court recommends a finding that, under the circumstances, the officers' inquiry, "Is this your duffel?" was designed to entice Lewis to admit ownership of both the bag and the marijuana residue inside it, and that Lewis's affirmative response should be suppressed. Based on the same reasoning, this court also recommends suppressing Lewis's response to the inquiry about the location of his hotel.

b. Independent Source and Inevitable Discovery Exceptions

Even if these statements are suppressed, however, the fruits of the hotel room search are admissible not only under the consent doctrine discussed above, but also under the independent source and inevitable discovery doctrines. The Sixth Circuit's formulation of these doctrines is laid out in *United States v. Leake*, 95 F.3d 409 (6th Cir. 1996):

> **Under the independent source doctrine, evidence will be admitted if the government can show it was discovered through sources 'wholly independent of any constitutional violation' . . . . The doctrine ensures that the government is not penalized for wrongdoing when such wrongdoing would not bear on the outcome of the case.**

***United States v. Leake*, 95 F.3d 409, 412 (6th Cir. 1996)(citing *Nix v. Williams*, 467 U.S. 431, 442-43 (1984) and *Murray v. United States*, 487 U.S. 533, 538-39 (1988)).**

> **Under the inevitable discovery doctrine, evidence may be admitted if the government can show that the evidence inevitably would have been obtained from lawful sources in the absence of the illegal discovery.**

Id.* The burden of proof lies with the government under both doctrines. *Id.

The independent source doctrine applies to Lewis's case. The officers found a Fairfield Inn notepad and a hotel key in the course of a lawful vehicle search. They deduced from these items that Lewis might be a guest of the Fairfield Inn. The officers called the Fairfield Inn, which confirmed that Lewis was a registered guest there. With that information in hand, the officers sought and received Lewis's consent to search the hotel room. The officers did not need Lewis's admission that he owned the duffelbag, nor Lewis's admission that the Fairfield Inn was located off American Way in Memphis, to discover that Lewis was a registered guest of that Fairfield Inn. Accordingly, it is submitted that the officers located Lewis's hotel room through

sources wholly independent of the unlawful interrogation, and therefore that the fruits of the hotel room search should be admitted.

Similarly, the inevitable discovery doctrine applies to Lewis's case. An inevitable discovery exception to the exclusionary rule may exist when "the government can demonstrate either the existence of an independent, untainted investigation that inevitably would have uncovered the same evidence or other compelling facts establishing that the disputed evidence inevitably would have been discovered." *Id.* (quoting *United States v. Kennedy*, 61 F.3d 494, 499 (6th Cir. 1995), *cert. denied* 517 U.S. 1119 (1996))(emphasis in original).

The facts of this case indicate that the officers would have attempted to investigate the hotel room, even without Lewis's unlawful interrogation. Officer Elrod specifically testified that, from the outset, he intended to search the hotel room if he could. The Fairfield Inn notepad and hotel key in the duffelbag would lead a reasonable officer to further inquire about the Fairfield Inn. The totality of the circumstances surrounding this stop would also lead a reasonable officer to believe there was contraband in the hotel room and give rise to probable cause to search that room. Even without the unlawful interrogation, the officers would have located and searched the room and discovered the gun. Accordingly,

it is submitted and that the fruits of the hotel room search should be admitted.

CONCLUSION

In summary, for the reasons set forth above, it is recommended that the court exclude two of Lewis's statements from evidence: first, his admission that he owned the duffelbag, and, second, his admission that he was a guest of the Fairfield Inn in Memphis. However, it is further recommended that neither exclusion should operate to suppress the fruits of the Fairfield Inn hotel room search. Accordingly, it is recommended that Lewis' motion be granted as to his two statements and denied as to all other statements and evidence.

Respectfully submitted this 14th day of January, 2003.

_____

DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE